

NO. 83709-1

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY S. MARTIN,

Appellant.

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SUPPLEMENTAL BRIEF OF RESPONDENT

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## **I. ISSUES**

At the defendant's trial for three counts of first degree kidnapping and one count of second degree robbery the defendant exercised his right to testify on his own behalf. The defendant answered some questions on both direct and cross examination by referring to the testimony of witnesses who testified before him. The prosecutor then inquired about the defendant's opportunity to preview the evidence before testifying. The prosecutor did not argue the defendant tailored his testimony in closing arguments.

1. Did the prosecutor's cross examination violate the defendant's right to testify and confront witnesses as guaranteed by Article 1, § 22 of the Washington State Constitution?

2. If the line of cross examination did not result in a constitutional violation, should this Court fashion a rule barring such cross examination when to do so would be contrary to the laws of this State since territorial times and would work to impair the truth seeking function of a trial?

## **II. STATEMENT OF THE CASE**

On October 18, 2006, Jessica Sobania prepared to leave the Smoky Point Rite Aid parking lot by putting her two children ages 3 and 5 in her van. As she did so a man came up behind her and

forced her into the van while threatening to injure her children. The man forced Ms. Sobania to drive. During the drive he demanded money, and rummaged through Ms. Sobania's purse. The man eventually directed her to a dark rural road where he ordered her to stop the van so that he could take over driving. While they were switching seats Ms. Sobania escaped out of the van. The man's attempts to pull her back in the van ceased when the neighbor called out. The man took off in the van with Ms. Sobania's children. 12-4-07 RP 12, 15, 20-21, 24-32.

The kidnapping was immediately reported to police. Shortly thereafter police issued an Amber Alert. An employee of the Thompson foundry in Marysville noticed the Amber Alert on the way to work about 4:30 a.m. October 19, 2006. When he arrived the van referenced in the alert was parked by the foundry. Ms. Sobania's children were found inside. 12-4-07 RP 80-81, 119-125, 131-136; 12-6-07 RP 119.

Timothy Martin's DNA was found inside the van on the steering wheel and on a set of keys. Ms. Sobania's purse and a number of her belongings were found a short distance from the van in a hole in some bushes. The defendant's identification and coat were found next to those items in the bushes. 12-4-07 RP 50; 12-

5-07 RP 37; 12-6-07 RP 70, 134-35, 171-75; 12-7-07 RP 170-175, 184.

Ms. Sobania worked with a sketch artist to help identify the kidnapper. The sketch drawn from her memory looked like the photograph on the defendant's identification found in the bushes with her belongings when facial hair was added.<sup>1</sup> 12-4-07 RP 35-37, 99-100, 110-112; 12-6-07 RP 199-21.

Four people saw the defendant on October 19, 2006 between about 10:00 a.m. and evening. Each of those four people noted the defendant appeared nervous. He acted as if he did not want to be seen. The defendant told one person, Charles Walker, that "they are chasing me." Two people, a police officer and Gerri Summers, observed the defendant was trying to change his appearance. The defendant told Ms. Summers about a woman, some children, and a van. The defendant agreed with Ms. Summers when she expressed the opinion that what he told her amounted to kidnapping. 12-5-07 RP 51, 59, 62-63, 78, 82-86; 2-6-07 RP 12-20, 60-69.

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<sup>1</sup> A copy of Ms. Sobania's original sketch, the one with added facial hair, and the defendant's identification issued the day before the kidnapping are attached to the State's response brief.

The defendant was charged with three counts of first degree kidnapping and one count of first degree robbery. Ms. Sobania identified the defendant in court as the person who kidnapped her and her children. The defendant testified in his defense case. The defendant explained he had been on his way to see his ex-wife when he entered Ms. Sobania's van in order to steal money to give to his ex-wife when he saw her. The defendant stated he left the van after he became startled when he saw the two children in the back seat. He dropped his "jiggler" keys used to break into vehicles, but took Ms. Sobania's purse. 12-4-07 RP 51; 12-11-07 RP 10-11, 18-24; 1 CP 126-127.

The defendant was asked during both direct and cross examination about what time he arrived at the foundry. In both portions of his testimony the defendant said that he was basing his testimony on that point on the testimony of witnesses who had previously testified. On direct examination the defense attorney asked if the defendant had heard Mr. Wallace and Ms. Summer's testimony. The defendant was then asked about what they testified to and what his version of those events had been. 12-11-07 RP 28, 36-37, 43-44, 74.



On cross examination, after the defendant reiterated that he based a portion of his testimony on the testimony of other witnesses, the prosecutor asked the defendant about his opportunity to preview the evidence both before and during trial.<sup>2</sup> The defense objected on the basis that the line of questioning was a comment on the defendant's right to confer with counsel and his right to remain silent. The objection was overruled. The defendant was convicted of all four counts.<sup>3</sup> 12-11-07 RP 47-82; 1 CP 44-47.

### **III. ARGUMENT**

The defendant contends that the prosecutor's cross examination of the defendant regarding his opportunity to pre-view the evidence before he testified violated his right to testify on his own behalf and his right to confront witnesses guaranteed by Article 1, § 22 of the Washington Constitution. The Supreme Court has determined the comparable provisions in the Sixth Amendment are not violated by argument that the defendant's opportunity to hear the witnesses before testifying is evidence that he tailored his own testimony. Portuondo v. Agard, 529 U.S. 61, 73, 120 S.Ct. 1119, 1127, 146 L.Ed.2d 47 (2000).

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<sup>2</sup> A copy of the relevant portions of the transcript is attached as Appendix A to the State's response brief.

The defendant argues that Article 1, § 22 provides greater protection. Alternatively, if the State Constitution provides no greater protection in this regard, he argues this Court should craft a rule prohibiting the State from challenging the credibility of the defendant's testimony by examining him on his opportunity to preview the evidence before testifying. This Court should reject both of those arguments.

**A. IN THE CONTEXT OF THIS CASE THE DEFENDANT'S STATE CONSTITUTIONAL RIGHT TO TESTIFY AND CONFRONT WITNESSES HAS NOT BEEN VIOLATED.**

The Court of Appeals rejected the defendant's argument that the prosecutor's cross examination violated his right to testify and to confront witnesses under Washington's Constitution after performing a Gunwall analysis.<sup>4</sup> The defendant contends the Court of Appeals decision conflicts with Gunwall. Petition for Review at 4.

Gunwall considered the scope of protection afforded in Washington Constitution Article 1, § 7, not Article 1, § 22. Gunwall, 106 Wn.2d at 63. Even if that case had dealt with the same constitutional provision at issue here, the Court of Appeals decision would not have been in conflict with that decision. The context in

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<sup>3</sup> A more detailed recitation of the facts is contained in the State's response brief. It is incorporated herein by reference.

<sup>4</sup> State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

which the issue has been raised determines whether an additional analysis is required. “A determination that a given state constitutional provision affords enhanced protection in a particular context does not necessarily mandate such a result in a different context.” State v. Russell, 125 Wn.2d 24, 58, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129, 115 S.Ct. 2004, 131 L.Ed.2d 1005 (1995). Since Gunwall had nothing to do with the scope of the defendant’s rights as a witness at trial, the decision of the Court of Appeals in this case is not in conflict with that decision.

This Court set out six non-exclusive criteria for determining whether in a given situation the Washington State constitution extends broader rights to citizens than the United States Constitution. They are (1) the textual language of the comparable provisions; (2) the difference in texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern. Gunwall, 106 Wn.2d at 58. The State has already presented an analysis under these criteria in its response brief and relies on that analysis here. Brief of Respondent 19-25.

The Court has noted that no Washington case to date has “established the contours of any difference between the right of

confrontation as secured by [Article 1, § 22] and the right of confrontation as secured by the Sixth Amendment.” State v. Saunders, 132 Wn. App. 592, 605, 132 P.3d 743 (2006), review denied, 159 Wn.2d 1017, 157 P.3d 403 (2007). The defendant’s right to testify or confront witnesses in the context presented here before this case has not yet been examined by Washington Courts.

In other contexts Courts have found with respect to the right to confrontation that the language used in the Sixth Amendment and Article 1, § 22 is not significantly different. State v. Florczak, 76 Wn. App. 55, 71 n.9, 882 P.2d 199 (1994) review denied, 126 Wn.2d 1010, 892 P.2d 1089 (1995), State v. Foster, 135 Wn.2d 441, 459, 957 P.2d 712 (1998) (majority opinion).

The dissent in Foster reached a different conclusion. It relied in part on a thesis for a masters of arts degree at the University of Washington to find there was significant difference in the textual language between the two constitutions in the context of the manner of confrontation. Foster, 135 Wn.2d at 485 n. 2. That thesis in turn relied on interviews with surviving members of the State constitutional convention and newspaper reports from that time. The contemporary news reports of the day do not support the conclusion that the difference in language between the two

constitutional provision indicated an intent for broader protection under the State constitution. None commented on any significant difference between the United States and Washington's Constitution. One article specifically stated that when the committee on the preamble and bill of rights made its report there were no new features, except to practically abolish the grand jury system. Washington State Constitutional Convention, Contemporary Newspaper Articles, 1-51, August 2, 1889.

The defendant has asserted that since the Sixth Amendment did not specifically include a right to testify and Article 1, § 22 did, the State Constitution provides broader protection than its federal counterpart. Petition at 7. He draws an analogy between Gunwall's analysis of Article 1, § 7 and the Fourth Amendment. That analogy is inapt because there was no provision in the Fourth Amendment that had been interpreted to be the equivalent of the "private affairs" language relied on by this Court in Gunwall. In contrast the right to testify on one's own behalf is secured by the defendant's right to due process and guarantee against compelled testimony under the Fifth Amendment and the right to compulsory process under the Sixth Amendment. Rock v. Arkansas, 483 U.S. 44, 51-53, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987).

The defendant has also argued that the “face to face” language in Article 1, § 22 expresses an intent to provide broader protection than the federal constitution. A majority of this Court has not found that to be the case in Foster, supra.

In addition, the face to face argument focuses on the mechanics of confrontation, which is not the issue presented here. Rather the issue here focuses on the substance of confrontation; is it permissible to explore the credibility of the defendant’s testimony by inquiring into his opportunity to preview the evidence before testifying? In this regard the cross-examination did not challenge the defendant’s right to testify or the right to confront witnesses at all.

This Court has consistently recognized that as long as the cross-examination or argument did not focus on the exercise of the constitutional right itself it did not infringe upon a constitutional right. State v. Gregory, 158 Wn.2d 759, 807, 147 P.3d 1201 (2006), State v. Crane, 116 Wn.2d 315, 331, 804 P.2d 10, cert. denied, 501 U.S. 1237, 111 S.Ct. 2867, 115 L.Ed.2d 1033 (1991). In Gregory the defendant was charged with rape. The case involved a credibility contest between the victim and the defendant. Questions posed to the victim about the emotional effect of the case on her were found

not to be a comment on the defendant's exercise of his right to confront the witness because the focused on the witnesses' credibility in relation to the defendant's credibility. Gregory, 158 Wn.2d at 807-08.

Applying the rule set out in Gregory the cross examination here was not a comment on the defendant's right to testify or to confront the witnesses against him. The suggestion from the line of questioning at issue here is not that the defendant is guilty because he exercised those rights. Instead the cross examination focused solely on the weight to be afforded the defendant's testimony. Because it was not a comment on the exercise of the defendant's rights the Court should find the questioning did not violate either right.

**B. A RULE THAT PROHIBITS THE TYPE OF QUESTIONING IN THIS CASE WOULD IMPAIR THE TRIAL'S TRUTH FINDING FUNCTION.**

In the absence of finding the prosecutor's questions violated the defendant's State Constitutional rights the defendant asks this Court to fashion a rule that would across the board prevent that type of questioning. This Court should decline to do so because it is contrary to how this State has historically treated criminal defendants who have exercised their rights to testify.

The defendant has pointed out that the Court has inherent rule making authority which it has previously used to establish sound judicial practice. BOA at 43, Petition at 12. The rules that this Court has crafted based on that authority were done so in order to promote the truth finding function of a trial.

Thus this Court adopted a rule that promoted timely gathering of relevant evidence when it adopted CrRLJ 3.1. That rule provides a suspect access to counsel as soon as feasible after arrest. The rule was not required under either the State or Federal Constitutions. State v. Templeton, 148 Wn.2d 193, 212, 59 P.3d 632 (2002). This Court adopted CrRLJ 3.1 because it was essential to effectively prepare to defend a DUI charge, given the rate at which alcohol dissipates, and the need for a disinterested person's observations of the defendant's condition at or near the time of arrest. Id at 212, Tacoma v. Heater, 67 Wn.2d 733, 739, 409 P.2d 867 (1966).

This Court acted to benefit trial practice by adopting a rule favoring a pattern jury instruction over an alternative instructing covering the same subject in State v. Bennett, 161 Wn.2d 303, 165 P.3d 1241 (2007). While the alternative instruction was not erroneous, this Court directed lower court to refrain from using it in



favor of the pattern instruction. The alternative instruction was not clearer than the pattern instruction and the pattern instruction permitted each side to argue its theory of the case. Moreover, this Court believed uniformity on the issue was beneficial to trial practice. Id at 316-18.

Each of these cases demonstrates the Court will use its supervisory power to create rules which enhance the truth finding function of a trial. Both providing the defendant with the opportunity to develop relevant evidence in a timely manner, and providing the jury with a clear framework for evaluating the evidence which did not hamper either party's ability to present their theory of the case is aimed at finding the truth of what happened. Prohibiting the State from inquiring into circumstances which bear on the credibility of the defendant's testimony does not enhance the search for the truth. Rather it does the exact opposite, it impedes that process.

From territorial times the State has granted the defendant the right to testify on his own behalf. The State has a corollary right to cross-examine the defendant "subject to all of the rules of law relating to cross examinations of other witnesses." Washington code of 1881, §1067. (currently codified as RCW 10.42.040). Courts have repeatedly affirmed the defendant is subject to cross

examination in the same manner as any other witness. State v. Etheridge, 74 Wn.2d 102, 113, 443 P.2d 536 (1968), State v. Burke, 163 Wn.2d 204, 217, 181 P.3d 1 (2008), State v. Graham, 59 Wn. App. 418, 527, 798 P.2d 314 (1990).

A witness may be cross examined regarding the subject matter of the direct examination and matters affecting the credibility of the witness. State v. Lord, 117 Wn.2d 829, 870, 822 P.2d 177 (1991), cert. denied, 506 U.S. 856, 113 S.Ct. 164, 121 L.Ed.2d 112 (1992), ER 611(b). Thus, cross-examination that covered material matters within the scope of the defendant's direct examination is permissible. State v. Olson, 30 Wn. App. 298, 300-01, 633 P.2d 927 (1981). A witness may be cross-examined about matters affecting his credibility, including bias, ill will, interest, or corruption. State v. Russell, 125 Wn.2d 24, 92, 882 P.2d 747 (1994), cert denied, 514 U.S. 1129, 115 S.Ct. 2004, 131 L.Ed.2d 1005 (1995) (finding cross examination of a defense investigator designed to emphasize her role as part of the defense team and to show that her investigative techniques were often suggestive and incomplete was within the proper scope of cross-examination).

The scope of the State's cross-examination of the defendant may include other matters which are relevant to issue in the case.

State v. Rivers, 129 Wn.2d 697, 921 P.2d 495 (1996), ER 611(b).

In Rivers the defendant was charged with robbery. The defendant's testimony contradicted defense counsel's theory of the case in opening statements. This Court held it was not an abuse of discretion to permit the State to cross-examine the defendant regarding his knowledge of defense counsel's assertions in opening statement because it was relevant to assist the jury in clarifying the nature of the defense charged. Id. at 709. Although this Court did not note it, the cross examination at issue in Rivers most certainly challenged the defendant's credibility in that it underscored one more inconsistency in the defendant's version of events.

The purpose of a criminal trial is to find the truth. In re Taylor, 105 Wn.2d 683, 691-92, 717 P.2d 755 (1986). (referring to the truth finding function of a criminal trial in the context of applying a new rule of law retroactively on collateral review). Perry v. Leeke, 488 U.S. 272, 282, 109 S.Ct. 594, 600, 102 L.Ed.2d 624 (1989) (noting that when the defendant assumes the role of witness the rules that apply to other witnesses which serve the truth-seeking function of the trial are generally applicable to the defendant as well.) Cross-examination is "the principal means by which the believability of a witness and the truth of his testimony are tested."

Foster, 135 Wn.2d at 456, quoting Kentucky v. Stincer, 482 U.S. 730, 736, 107 S.Ct. 2658, 2662, 96 L.Ed.2d 631 (1987) (quoting Davis v. Alaska, 415 U.S. 308, 316, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347 (1974)). The defendant's position is that that the State should be precluded from inquiring into a subject that directly explores the source of the defendant's testimony, and therefore its truthfulness. It is an area of cross examination that the defendant could employ for any State's witness who was present for some or all of the testimony presented.<sup>5</sup> His position would unreasonably hamper that search for the truth. This Court should reject the defendant's invitation to adopt such a rule.

The cases from other jurisdictions cited by the defendant do not lend support to his position in this case. In each of these cases<sup>6</sup> the courts considered tailoring arguments made in closing arguments. Here the question is not whether it is proper to suggest the defendant tailored his testimony in closing, but rather whether it is proper to explore that issue on cross examination. To the extent

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<sup>5</sup> That situation could occur when a case officer is permitted to sit through the State's case and testifies toward the end of the presentation of evidence. It could arise when it becomes necessary to call a witness in rebuttal when that witness has testified in the State's case in chief, was released from the sequestration order and sits through portions of the remainder of the case including any witnesses the defendant presented.

that the New Jersey Court applied its rule to cross-examination in Daniels, the cross examination here was still proper. Daniels, 861 A.2d at 820. Daniels only limited generic accusations of tailoring, but permitted those examinations when there was evidence in the record to support the claim. Id. at 819. Here there was such evidence because the defendant said he based some of his testimony on the testimony of other witnesses. It was also reasonable to infer tailoring because of the way the defendant's testimony conveniently interlocked with the State's evidence.

Finally, Washington Courts that considered this issue before Portuondo rejected the idea that the type of cross-examination here was impermissible. State v. Smith, 82 Wn. App. 327, 917 P.2d 1108 (1996), review denied, 130 Wn.2d 1023, 930 P.2d 1231 (1997), overruling recognized, State v. Miller, 110 Wn. App. 283, 40 P.3d 692 (2002). Questions that focused on the defendant's preview of the evidence did not violate the defendant's constitutional right to be present at trial and confront witnesses because they did not focus on the exercise of those rights but rather raised an inference from the defendant's testimony. Id. at

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<sup>6</sup> State v. Daniels, 861 A.2d 808 (N.J. 2004), Commonwealth v. Person, 508 N.E.2d 88 (Mass 1987), Commonwealth v. Gaudette, 808 N.E.2d 798 (Mass. 2004), Commonwealth v. Beauchamp, 677 N.E.2d 1135 (Mass 1997).

335. This is precisely the distinction this Court has made in Gregory. The rule proposed by the defendant would erase that distinction, and work to diminish the truth finding function of a trial.

#### IV. CONCLUSION

For the forgoing reasons the State asks the Court to find that in the context of cross examining the defendant about his opportunity to preview the evidence before he testifies, Article 1, § 22 of the Washington Constitution is no more protective than the Sixth Amendment. The State further asks this Court to decline the defendant's invitation to adopt a rule that would prohibit the kind of cross examination that was conducted in this case.

Respectfully submitted on April 16, 2010.

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